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**CHARLES CLARK CRUICKSHANK**

**IN THE  
SUPREME COURT OF THE UNITED STATES.**

**OCTOBER TERM, 1947.**

**WM. J. LEMP BREWING COMPANY,**  
Petitioner,

**v.**

**EMS BREWING COMPANY,**  
Respondent.

No. **634...**

**PETITION FOR WRIT OF CERTIORARI  
To the United States Circuit Court of Appeals  
for the Seventh Circuit  
and  
BRIEF IN SUPPORT OF THE PETITION.**

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IN THE  
**SUPREME COURT OF THE UNITED STATES.**

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OCTOBER TERM, 1947.

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WM. J. LEMP BREWING COMPANY, Petitioner,	}	No. ....
v.		
EMS BREWING COMPANY, Respondent.		

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**PETITION FOR WRIT OF CERTIORARI**  
**To the United States Court of Appeals**  
**for the Seventh Circuit.**

---

To the Honorable Fred M. Vinson, Chief Justice of the  
United States and Associate Justices:

Your petitioner, Wm. J. Lemp Brewing Company, a Missouri corporation, respectfully presents its petition for the issuance of a writ of certiorari directed to the United States Circuit Court of Appeals for the Seventh Circuit and shows to this Honorable Court the following:

I.

**STATEMENT OF THE MATTER INVOLVED.**

Petitioner, a Missouri corporation, filed a complaint against respondent, an Illinois corporation, in two counts, in the United States District Court for the Eastern District of Illinois to recover \$750,000.00 damages alleged to have resulted from the wrongful abandonment, termination, repudiation and breach of contract (R. 2-23).

The sole basis of the jurisdiction of the federal court was diversity of citizenship (R. 2).

Petitioner alleged in its complaint that by the terms of a written contract entered into between petitioner and Central Breweries on August 25, 1939 (R. 3), which respondent had acquired by purchase on November 24, 1941 (R. 6), respondent was bound to produce and sell beer under the name of Lemp (R. 4).

It was alleged that said contract contained no provision for cancellation and was not subject to cancellation except by mutual consent or for cause (R. 7).

It was further alleged that from and after its acquisition of the contract the respondent continuously thereafter until and including February 28, 1945, manufactured, produced and sold beer under the Lemp name (R. 6).

Petitioner alleged that under date of November 30, 1944, respondent wrongfully and illegally and without cause or justification advised petitioner of its intention to abandon the name Lemp as part of its corporate title and to discontinue the use of the name Lemp in connection with beer manufactured, produced and sold by it from and after February 28, 1945; and further advised petitioner that it would consider the contract terminated as of February 28, 1945; that on December 29, 1944, respondent changed its corporate name from Lemp Brewing Company to Ems Brewing Company, and that beginning March 1, 1945, respondent discontinued the use of the name Lemp in connection with beer manufactured, produced and sold by it (R. 7).

It was alleged that the acts of the respondent in abandoning the name of Lemp as part of its corporate title, and discontinuing the manufacture, production and sale of beer under the Lemp name and refusing to pay petitioner the

amount provided in the contract on beer manufactured, produced and sold subsequent to February 28, 1945, constituted an abandonment, repudiation and breach of contract (R. 7).

In the alternative petitioner alleged in the first count that if respondent had the lawful right to terminate the contract without the consent of the petitioner, such right of termination could be exercised only upon reasonable notice and under circumstances which would fully restore the petitioner to the position it occupied at the time the contract was entered into; that the notice was not reasonable because at the time notice of termination was given there was in force Order No. 66 of the War Food Board, which made it impossible for the petitioner to engage in the manufacture, production and sale of beer; and that at the time respondent served notice of its intention to terminate the contract it had knowledge of said Order and knew that by reason thereof petitioner could make no effective use of its name and charter powers (R. 8).

In the second count petitioner alleged that respondent's cancellation, under the circumstances then existing, was not made in good faith, but with the wrongful and willful purpose and intent of impairing the value of petitioner's name and eliminating any competition on the part of the petitioner with the respondent in the manufacture, production and sale of beer (R. 9-12).

A copy of the written contract was appended to the complaint, Plaintiff's Exhibit "A" (R. 13-19).

The parties to the contract were Central Breweries, Inc. (respondent's predecessor in interest), petitioner and Wm. J. Lemp (R. 13).

From the contract it appears that Wm. J. Lemp, the fourth generation of the Lemp family which had begun

the manufacture of Lemp beer in St. Louis in 1840, had organized the petitioner as a corporation under the law of Missouri to preserve the family name in connection with the manufacture of beer; that the petitioner was the owner of the records, formulae and analyses relating to the manufacture of Lemp beer; that no corporation having a similar name could be organized or licensed to do business in Missouri without the consent of petitioner; that petitioner had reserved the use of the corporate name in Illinois and had likewise registered its name in the patent office; that the name "Lemp" was not available to Central without the consent of petitioner and Wm. J. Lemp (R. 13-14).

The contract recited that "the parties deem it to be to their mutual advantage that through their mutual co-operation and under their mutual supervision a high quality beer be manufactured and produced by First Party (Central) to be sold under a name or designation containing the name Lemp" (R. 14).

In consideration of the premises and the mutual covenants and conditions, petitioner and Wm. J. Lemp (1) warranted the truthfulness of the representations made by them (2) granted to Central the use of the name "Lemp" as part of its corporate title, (3) granted to Central the use of the name "Lemp," "Lemp Pale Lager," "Lemp Light Lager," "Lemp St. Louis," in connection with beer to be manufactured and sold by it; (4) granted such use to such others as might be approved by Central, (5) warranted that there were no other corporations in existence having the name Lemp, (6) agreed that they would not engage in the manufacture of beer without the consent of Central, (7) agreed that they would not consent to the use of said name by any one other than Central, (8) agreed that they would take all necessary action to prevent the use of the name by others, (9) agreed that they would in-

demnify Central from liability arising out of the use of the name, (10) warranted that Wm. J. Lemp had the right to organize petitioner and to sell Lemp beer, and that there were no restrictions on his right to do so (R. 14-15), (11) agreed that the records relating to the manufacture of Lemp beer would be open to inspection, examination and use by Central (R. 16-17).

Central agreed to pay petitioner "upon beer manufactured, produced and sold by it beginning November 1, 1939," royalties set forth in the Fourth Clause of the contract, and further agreed not to pay royalties to anyone else without approval of petitioner (R. 16).

Central further agreed that it would submit to its stockholders the proposal to change the corporate name to "Lemp, Inc.," or "Wm. J. Lemp Brewing Company" (R. 17).

By the sixth clause of the contract it was "understood and agreed that it is the mutual desire of all the parties hereto to produce and sell a high quality beer under the 'Lemp' name and to that end the methods of brewing, advertising and marketing the beer" were made subject to the approval of the petitioner with a provision for arbitration in the event of a difference of opinion (R. 17).

By the Eighth Clause of the contract petitioner granted to Central an option for a period of five years for the purchase of all of its assets, including the contract, and agreed that during that period it would not dispose of its assets except subject to the option. It was further agreed that all of the existing stockholders of the petitioner, as part of the consideration of the contract, would give to Central an option of five years to acquire their stock (R. 18). Appended to the contract and made a part thereof was the agreement of the stockholders by which they gave

Central an option for a period of five years to acquire their stock and by which they agreed that they would not dispose of their stock except subject to the option (R. 19).

Respondent filed an answer to the complaint (R. 24-29) consisting of certain admissions, denials and affirmative defenses.

Thereafter respondent filed a motion for judgment on the pleadings asserting that it was entitled to judgment as a matter of law upon the grounds that the complaint showed that the contract contained no termination date, and that it was therefore terminable at will (R. 30), and that the complaint showed that the contract provided for the payment of royalties to the petitioner only on beer produced, brewed or sold while respondent had the name Lemp as a part of its corporate title (R. 30-31).

There were no allegations in the complaint, answer or motion as to the place of execution of the contract or the place or places where it was to be performed. Respondent's motion for judgment was not accompanied by any affidavit and it tendered no proof as to the place of execution or the place or places of performance. The contract itself (R. 13-19) contained no recital as to the place of its execution, and on its face did not limit performance to any one state.

The motion for judgment on the pleadings was taken under submission by the District Court upon arguments of counsel and briefs theretofore filed (R. 33).

In the brief which it filed in the District Court petitioner contended that any ruling by the District Court upon respondent's motion for judgment would be premature for the reason that the record did not disclose the place of execution of the contract, and that under the Illinois con-

flict of laws rule, the rights of the parties were governed by the law of the place of execution of the contract; and in this connection the petitioner made the following statement in its brief:

“The contract does not disclose on its face the place of execution.

“The complaint does not allege the place of execution; nor are there any allegations in the answer of the defendant which undertake to set forth the place of execution.

“Under the pleadings, the plaintiff is at liberty to prove and expects to prove that in point of fact the contract was entered into in the City of St. Louis, Missouri.

“Nothing on the face of the contract purports to limit its performance by any of the parties to any one state.”

The District Court filed a Memorandum of Opinion (R. 33-35) in which it held: That the contract was complete within itself and did not admit of extraneous evidence to aid in its proper interpretation; that after five years from the time the contract went into effect, if the option provided therein was not exercised, the contract was terminable at will by either party; that the notice of termination was not only reasonable in length of time, but went beyond any requirement of the contract; that conditions which prevailed at the time the notice was given were immaterial in view of the terms of the contract; that respondent was under no obligation to continue the manufacture and sale of beer under the name of Lemp, or under a corporate name of which the name Lemp was a part; that respondent was not precluded from manufacturing and selling beer under any other name it might choose; that respondent could terminate without liability before the end of any contract year.

The District Court then ordered that the complaint be dismissed at petitioner's costs (R. 36).

The Opinion of the learned District Court makes no reference to the law of Illinois or to the law of Missouri, and does not cite decisions of any courts of Illinois, or any courts of Missouri, or any courts whatsoever.

Petitioner appealed to the Circuit Court of Appeals for the Seventh Circuit, and that Court, on November 5, 1947, delivered an Opinion (164 F. 2d 290) affirming the judgment (R. 52-56).

The Circuit Court of Appeals held that the contract was not ambiguous and that it was terminable at the will of either party after the five-year option period had expired (R. 55).

The Circuit Court of Appeals in taking cognizance of the petitioner's claim that the Court could not determine the law governing the interpretation of the contract until the pleadings or proof established the fact as to the place where the contract was executed (R. 55-56), said:

“Moreover, in view of the holdings of the Missouri courts already noted, it is immaterial whether the law of Missouri or of Illinois governs the construction of the contract, and since the contract would be terminable at will under the law of either State, no question of conflict of laws is involved” (R. 56).

Petitioner in due course filed its petition for rehearing (R. 57), which was overruled by the Circuit Court of Appeals without further opinion on December 3, 1947 (R. 58).

## II.

### **OPINIONS BELOW.**

The Opinion of the District Court has not been reported. The Opinion of the Circuit Court of Appeals is reported in 164 F. 2d 290.

## III.

### **BASIS OF THIS COURT'S JURISDICTION.**

A. The date of the judgment of the Circuit Court of Appeals is November 5, 1947 (R. 57), and the date when said judgment became final, on the denial of the petitioner's motion for rehearing, was December 3, 1947 (R. 58). The date of this application for a writ of certiorari may be taken as the date of the filing of this petition in the office of the Clerk of this Court.

B. This Court has jurisdiction to review the judgment of a United States Circuit Court of Appeals under and by virtue of Section 240 (a) of the Judicial Code as amended (28 U. S. C., Section 347).

The jurisdiction of this Court is invoked under this Section and under Rule 38 (b) of the Rules of the Supreme Court of the United States.

C. The grounds upon which petitioner urges this Court to issue its writ of certiorari are:

1. Since the appropriate state law governing the construction of the contract was, under the conflict of laws rule of Illinois, the law of that state in which the contract was executed, the District Court had no power to grant respondent's motion for judgment on the pleadings in a diversity case upon a record which did not disclose the

place of execution of the contract, and it was the duty of the Circuit Court of Appeals to vacate the judgment and remand the cause.

2. In holding that it was immaterial whether the construction of the contract was governed by the law of Missouri or by the law of Illinois, the Circuit Court of Appeals did not search for and apply, as it was required to do by the decisions of this Court, the entire body of the substantive law of Missouri relating to the construction of the contract.

(a) The Circuit Court of Appeals failed to inquire into or to give effect to the law of Missouri as to the admissibility of extraneous evidence as to the intention of the parties where the contract is silent as to its duration and bottomed its conclusion that said evidence was inadmissible solely upon Illinois law.

(b) The Circuit Court of Appeals failed to inquire into or give effect to the law of Missouri that a continuing contract is not terminable at will where one party has received the benefit of a fully executed independent consideration.

(c) The Circuit Court of Appeals failed to inquire into or give effect to the law of Missouri that where a contract is terminable at will such termination cannot be effectuated except on reasonable notice and in good faith.

(d) The Circuit Court of Appeals failed to inquire into or give effect to the law of Missouri that reasonable notice was a question of fact to be determined by the triers of the fact.

(e) The Circuit Court of Appeals failed to inquire into or give effect to the law of Missouri that the obligation on the part of respondent to make Lemp beer would be implied from its acceptance of the contract.

D. Among the cases believed to sustain the jurisdiction of this Court are:

- Erie Railroad Co. v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188;  
Ruhlin v. New York Life Insurance Co., 304 U. S. 202, 82 L. Ed. 1290;  
New York Life Insurance Co. v. Jackson, 304 U. S. 261, 82 L. Ed. 1329;  
Rosenthal v. New York Life Insurance Co., 304 U. S. 263, 82 L. Ed. 1330;  
Klaxon Company v. Stentor Elec. Mfg. Co., 313 U. S. 487, 85 L. Ed. 1477;  
Griffin v. McCoach, 313 U. S. 498, 85 L. Ed. 1481.

#### IV.

#### QUESTIONS PRESENTED.

1. Does a federal court in a diversity case have the power, in the light of *Erie Railroad Co. v. Tompkins*, to grant judgment on the pleadings, where the record on which the judgment is predicated affords no basis for the ascertainment of the appropriate State law governing the rights of the parties?

[The action was for breach of contract and the rights of the parties were dependent upon the construction of the contract. Under the Illinois conflict of laws rule the construction of a contract is governed by the law of the State in which it was executed, except where the contract is to be wholly performed in one State. The pleadings did not allege where the contract was executed or where it was to be performed and there was no evidence offered in support of respondent's motion as to the place of execution or the place of performance.]

2. Was it the duty of the Circuit Court of Appeals to vacate the judgment entered on such a record and remand the cause?

3. Did the Circuit Court of Appeals, in ruling that it was immaterial whether the contract was governed by the law of Missouri or by the law of Illinois, give consideration and effect to the entire body of the substantive law of Missouri as it was required to by the decisions of this Court?

[The Circuit Court of Appeals held that the contract was terminable at will under the law of Missouri (R. 56).

In so doing, however, the Circuit Court of Appeals relied solely upon Illinois decisions in support of its ruling that extraneous evidence was not admissible for the purpose of ascertaining the intention of the parties (R. 54-55); and gave no consideration or effect to the Missouri law

(1) that a contract silent as to its duration is ambiguous and that extraneous evidence is admissible to resolve the ambiguity;

(2) that a contract is not terminable at will by a party who has received the benefit of an independent executed consideration;

(3) that a contract terminable at will can be terminated only on reasonable notice and in good faith;

(4) that an obligation to perform will be implied from the acceptance of the contract.]

V.

**REASONS RELIED UPON FOR ALLOWANCE  
OF WRIT.**

1. A federal court, in a diversity case, has no power to grant judgment on the pleadings where the record is silent as to a fact which must be determined before the court can ascertain the appropriate state law.

Erie Railroad Co. v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188;

Ruhlin v. New York Life Ins. Co., 304 U. S. 202, 82 L. Ed. 1290.

2. Since the construction of a contract, under the Illinois conflict of laws rule, is governed by the law of the place where the contract is made except where the contract is to be performed wholly in one state, the appropriate state law governing the rights of the parties could not be ascertained on a record which did not disclose the state in which the contract was made, or the state, if any, in which it was wholly to be performed.

Oakes v. Chicago Fire Brick Co., 388 Ill. 474, 479, 58 N. E. 2d 460;

Reighley v. Continental Illinois National Bank, 390 Ill. 242, 248, 61 N. E. 2d 29;

Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U. S. 487, 85 L. Ed. 1477;

Griffin v. McCoach, 313 U. S. 498, 85 L. Ed. 1481.

3. Since the judgment was based upon a record which made it impossible for the District Court to apply the appropriate state law, it was the duty of the Circuit Court of Appeals to vacate the judgment and remand the cause.

Erie Railroad Co. v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188;

New York Life Ins. Co. v. Jackson, 304 U. S. 261, 82 L. Ed. 1329;

Rosenthal v. New York Life Ins. Co., 304 U. S. 263,  
82 L. Ed. 1330.

4. In determining that it was immaterial whether the contract was governed by the law of Missouri or by the law of Illinois, the Circuit Court of Appeals was required to search for and apply the entire body of the substantive law of Missouri.

Ruhlin v. New York Life Insurance Co., 304 U. S.  
202, 82 L. Ed. 1290.

5. Included in the body of the substantive law of Missouri which the Circuit Court of Appeals was required to search for and apply was the Missouri law as to the admissibility of extraneous evidence considered in relation to a contract that contained no express provision for termination, since the so-called "parol evidence rule" is a rule of substance and not of procedure both in the federal courts and in Illinois.

American Crystal Sugar Co. v. Nicholas (C. C. A.  
10), 124 F. 2d 477, 479;

Zell v. American Seating Co. (C. C. A. 2), 138 F. 2d  
641, 643;

Wooton Hotel Corp. v. Northern Assurance Co.  
(C. C. A. 3), 155 F. 2d 988, 990;

Berkshire Life Ins. Co. v. Jackson Realty & Manage-  
ment Corp., 328 Ill. App. 318, 65 N. E. 2d 578.

6. The Circuit Court of Appeals did not inquire into the Missouri law as to the admissibility of the extraneous evidence and based its conclusion that said evidence was not admissible solely on Illinois law (R. 54-55).

7. Among the important aspects of the substantive law of Missouri relating to the rights of the petitioner which the court would have been required to follow upon a finding that the contract was a Missouri contract and which were not given either consideration or effect by the Circuit Court of Appeals are the following:

(a) A contract which contains no provision for termination is ambiguous so as to permit of extraneous evidence as to the intention of the parties.

Paisley v. Lucas, 346 Mo. 827, 143 S. W. 2d 262, 267, 268, 270;

Ambassador Bldg. Corp. v. St. Louis Ambassador, 238 Mo. App. 600, 185 S. W. 2d 827, 836.

(b) A party who has received the benefit of an independent additional consideration, such as the option granted by petitioners and its stockholders, cannot thereafter terminate his obligation at will.

Fullington v. Ozark Supply Co., 327 Mo. 1167, 39 S. W. 2d 780, 783;

Paisley v. Lucas, 346 Mo. 827, 143 S. W. 2d 262, 271;

Schonwald v. Burkhart Mfg. Co. (Mo.), 202 S. W. 2d 7, 15.

(c) A contract terminable at will can be cancelled only upon reasonable notice and in good faith.

Paisley v. Lucas, 346 Mo. 827, 143 S. W. 2d 262, 271;

Meyer Milling Co. v. Baker (Mo. App.), 10 S. W. 2d 668, 670, reversed on other grounds, 328 Mo. 1246, 43 S. W. 2d 794;

Clarkson v. Standard Brass Mfg. Co., 237 Mo. App. 1018, 170 S. W. 2d 407, 415.

(d) By accepting a contract and entering into a performance a party assumes the obligation of performance.

Beebe v. Columbia Axle Co., 233 Mo. App. 212, 117 S. W. 2d 624, 631.

8. Since this Court in *Erie Railroad Co. v. Tompkins* ruled that a federal court has no constitutional power to decide questions of substantive law in diversity cases ex-

cept in accordance with the appropriate state law, a departure from the course charted by this Court is per se an encroachment upon the right of a litigant to have his case determined in accordance with the federal constitution. This Court therefore may consider whether this constitutional right has been denied in substance and effect though not in express terms.

Oyama v. State of California, 92 L. Ed. 257 (Adv. Opinions).

Wherefore your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Seventh Circuit, commanding that court to certify and send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket "No. 9312, Wm. J. Lemp Brewing Company, Plaintiff-Appellant, v. Ems Brewing Company, Defendant-Appellee," and that said judgment may be reversed, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

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IN THE  
**SUPREME COURT OF THE UNITED STATES.**

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OCTOBER TERM, 1947.

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WM. J. LEMP BREWING COMPANY,	}	No. ....
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v.		
EMS BREWING COMPANY,	}	
Respondent.		

---

**BRIEF IN SUPPORT OF PETITION.**

---

I.

**JURISDICTION.**

A statement of the grounds on which the jurisdiction of this Court is invoked appears in the petition, and is, therefore, not repeated here.

II.

**STATEMENT OF THE CASE.**

A statement containing all that is deemed material to the questions presented appears in the petition under the heading "Statement of the Matter Involved," to which reference is hereby made.

III.

**SPECIFICATION OF ERRORS.**

The Circuit Court of Appeals erred in each of the following respects:

1. In failing to vacate the judgment and remand the case for the reason that the record did not provide a basis for the ascertainment of the appropriate State law.

2. In failing to vacate the judgment and remand the case for the reason that the District Court could not find and did not find the appropriate State law.

3. In ruling that it was immaterial whether the rights of the parties were governed by the law of Missouri or by the law of Illinois.

4. In ruling that there was no question of conflict between the law of Missouri and the law of Illinois.

5. In applying the law of Illinois as to the admissibility of extraneous evidence as to the intention of the parties to the contract.

6. In failing to search for and apply the law of Missouri as to the admissibility of extraneous evidence.

7. In failing to give consideration and effect to the entire body of the substantive law of Missouri.

8. In failing to give consideration and effect to the law of Missouri in the following particulars:

(a) That a party who receives in connection with a continuing contract the benefit of an independent additional consideration is not permitted to abandon the contract at will.

(b) That a contract terminable at will can be terminated only upon reasonable notice and in good faith.

(c) That an obligation to perform will be implied from a party's acceptances of a contract.

9. In ruling that respondent was entitled to judgment upon the pleadings under the law of Missouri.

10. In ruling that the complaint failed to state a claim entitling petitioner to relief under the law of Missouri.

IV.

**ARGUMENT.**

I.

The affirmance, in a diversity case, of a judgment on the pleadings based upon a record which provided the District Court no basis for the ascertainment of the appropriate State law is incompatible with the doctrine of *Erie Railroad Co. v. Tompkins*.

The considerations which moved this Court in *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, to overrule *Swift v. Tyson*, 16 Pet. 1, were fundamental in their nature as is made clear by the following excerpt from the Opinion (304 U. S. 77, 78):

“If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the unconstitutionality of the course pursued has now been made clear and compels us to do so.

“\* \* \* Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State, and whether the law of the State shall be declared by its legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature, or ‘general,’ be they commercial law or part of the law of torts. And no clause in the constitution purports to confer such a power upon the federal courts \* \* \*.”

It follows that a departure from the mode of decision prescribed in diversity cases by the *Erie* case involves

more than a transgression of procedural rules; such a departure invades the rights of the parties, under the Federal Constitution, to a judgment of the federal court reached through, and only through, the ascertainment and application of the appropriate State law.

The "appropriate" State law is not necessarily the law of the State in which the federal court is located since by the conflict of laws rule of that State the rights of the parties may be governed by the law of another State.

Williams v. Green Bay, 326 U. S. 549, 90 L. Ed. 311;

Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U. S. 487,  
85 L. Ed. 1477;

Griffin v. McCoach, 313 U. S. 498, 85 L. Ed. 1481.

The rights of the petitioner in the case at bar were founded upon a contract. Petitioner had alleged that by the terms of the contract respondent was obligated to manufacture and sell beer under the name of "Lemp"; that petitioner had wrongfully discontinued the manufacture and sale of "Lemp beer"; that the contract was not subject to termination at will; that if it were subject to termination at will, such termination could be effectuated only upon reasonable notice and in good faith; that the notice of termination given by respondent was not reasonable, and that respondent had not terminated in good faith (R. 2-231).

Respondent moved for judgment on the pleadings asserting that as "a matter of law" it had the right to terminate without liability and regardless of the reasonableness of the notice of termination or the existence of good faith (R. 30-31).

Since this was a diversity case, and since there is no federal general common law, the only "law" upon which the respondent was entitled to rely as the basis of its claim

to judgment was necessarily the appropriate State law ascertained as required by the decisions of this Court.

The appropriate **State**, the law of which would govern the construction, interpretation and effect of the contract, would be the State the law of which was made applicable by the conflict of laws rule of Illinois where the federal court was located.

The Circuit Court of Appeals cites *George v. Haas*, 311 Ill. 382, 143 N. E. 54, in support of the statement in its Opinion that parties are presumed to contract with reference to the law of the State where the contract is to be performed (R. 56).

The prevailing rule in Illinois is set forth in *Oakes v. Chicago Fire Brick Co.*, 388 Ill. 474, 58 N. E. 2d 460, 1. c. 462, as follows:

“From the record before us, it is plain that the agreement itself makes no provision or provisions as to the State or States wherein the services were to be performed and that no intention is to be gathered from the agreement or proof that the contract was to be wholly performed within the State of Illinois. \* \* \* To bring the rule announced in *George v. Haas*, 311 Ill. 382, 385, 143 N. E. 54 (the case relied on by the Circuit Court of Appeals) **into operation**, it was incumbent upon appellant to show that the agreement was to be **wholly** performed within this state. Where a contract is to be performed in **various** states, as in this case, the *lex loci contractus* must control. Otherwise if the law of the place of performance is to govern the law would find itself in a hopeless tangle.

“\* \* \* **Where there is nothing in the contract or in the proof to show where the contract is to be performed, it is governed by the law of the place where made.**” (Emphasis ours.)

It is clearly apparent that the effect of *George v. Haas*, 311 Ill. 383, has been limited by the Supreme Court of Illinois to a situation in which the contract is to be wholly performed within a single state. In fact the situation before the Supreme Court in *George v. Haas* involved performance at one place only for there the Court had under consideration the effect to be given as to the interest legally chargeable on a note which by its express terms was payable at the Isle of Pines.

And in *Reighley v. Continental Illinois National Bank*, 390 Ill. 242, 61 N. E. 2d 29, l. c. 32, the Supreme Court of Illinois held that it would be presumed that where a contract did not specify the place of performance it was to be performed at the place where made.

The appropriate state law governing the rights and obligations of the petitioner and the respondent would therefore be the law of the State where the contract was executed, or the law of the State where the contract was to be performed, **if the performance was confined to one single state.**

Respondent claimed it was entitled to judgment as a matter of law **upon the pleadings** (R. 30-31). Before the District Court could ascertain the appropriate State law it would be necessary for it to determine **from the pleadings** the State in which the contract was executed or the State, if any, in which the contract was to be **wholly** performed.

The pleadings on the basis of which the respondent sought favorable affirmative action by the District Court consisted of the complaint (R. 2-23) and the answer (R. 24-29).

Neither the complaint nor the answer sets out any allegation as to the **place** of execution of the contract; neither

alleges nor avers that the contract is to be performed wholly within one state.

Respondent's motion for judgment contains no statements as to the place of execution or place of performance. No affidavit or other evidence in support of the motion was proffered.

The contract itself attached to the complaint as Plaintiff's Exhibit "A" (R. 13-19), contains no recitals as to the place of execution or as to the place of performance. The fact that petitioner by the contract gave up its exclusive right to the use of the corporate name in both Missouri and Illinois, that it disclosed its formulae and granted to respondent the use thereof, that it conferred upon respondent the right to make and sell beer without any limitation as to place, and the fact that it undertook to refrain from making beer without any limitation as to place, negative any inference that the contract was to be wholly performed in a single state.

The petitioner contended in the District Court that the appropriate state law could not be ascertained upon the pleadings, and that therefore the District Court not rule upon the questions of law involved in the respondent's motion for judgment in the manner directed by this Court in *Erie v. Tompkins*, and in that connection petitioner advised the District Court that it was at liberty to prove and expected to prove that the contract was executed in Missouri.

Petitioner had endorsed on its complaint a request for a trial by jury (R. 12) and by virtue of said request was entitled to the finding of the jury as to the place of execution of the contract.

But whether this question of fact was to be determined by the jury or by the District Court on a preliminary hear-

ing, we respectfully submit that until this question of fact had been resolved it was impossible for the District Court to discharge the duty, clearly prescribed by this Court, of ascertaining the appropriate State law.

In its Opinion the District Court disposed of the Motion for Judgment without reference to any specific law or without comment as to the local law of Illinois, the conflict of laws rule of Illinois, or the local law of Missouri, and without any finding of fact as to the place of execution of the contract or the place of performance thereof (R. 33-35).

The record before the Circuit Court of Appeals disclosed on its face that the District Court could not have granted respondent's motion for judgment on the basis of the appropriate State law since the record was lacking in an essential prerequisite to the ascertainment of the appropriate State law, to-wit, the fact as to the place of execution of the contract.

If, as this Court has held in the Erie case, a federal court is limited in its decision of questions of substantive law in diversity cases to the confines of the appropriate state law, the act of the District Court in undertaking to rule upon questions of substantive law under circumstances which afforded no basis for the ascertainment of the appropriate state law was in excess of the jurisdictional power vested in it.

The record in the case at bar is not one in which the only question involved was whether or not the District Court erred in its view as to the appropriate State law, but presented a situation where it was impossible for the District Court to ascertain the appropriate State law.

It was therefore the duty of the Circuit Court of Appeals to vacate the judgment and to remand the cause.

This Court does not undertake initially to determine whether the result would be the same if the appropriate State law had been ascertained and applied. It refused specifically to follow such a course in *Rosenthal v. New York Life Ins. Co.*, 304 U. S. 263, 264, 82 L. Ed. 1330, 1331, wherein this Court said:

“While respondent contends that the decision below is not in conflict with local law it is not necessary for us to determine that question. It is enough to say that the questions to be decided are those of state law and should have been determined according to the decisions of the state court.”

The dictate of *Erie v. Tompkins* is simple, direct and unequivocal. It affords no latitude for an “either-or” basis of decision in the District Court initially or in the Circuit Court of Appeals on appeal.

In the case at bar the attention of the District Court in the first instance and the Circuit Court of Appeals on appeal would have been limited and circumscribed to a careful and detailed consideration of Missouri law if the triers of fact had found that the contract was a Missouri contract; conversely it would have been concentrated on the Illinois law if the triers of fact had found that the contract was an Illinois contract.

Moreover the petitioner was entitled to have the benefit of the District Court’s judgment as to the Missouri law if the facts disclosed that the contract was a Missouri contract.

The failure of the Circuit Court of Appeals to vacate the judgment is so far a departure from the principles declared by this Court in the *Erie* case as to warrant the issuance of the writ of certiorari as prayed.

II.

The Circuit Court of Appeals, in holding that there was no conflict between the law of Missouri and the law of Illinois failed to search for and apply the entire body of the substantive law of Missouri as it was required to do by the decisions of this Court.

Notwithstanding the fact that the case was not, and could not have been, decided in the District Court in the manner required by this Court, the Circuit Court of Appeals affirmed the judgment on the ground that it was immaterial whether the contract was governed by the law of Missouri or by the law of Illinois.

If the Circuit Court of Appeals had the power to sanction the failure of the District Court to follow the course charted for it by this Court in *Erie Railroad Co. v. Tompkins* upon the ground that the same result would have followed if the appropriate State law was the law of Missouri, it was under the obligation to search for and apply the whole of the Missouri substantive law in the course of reaching its conclusion.

This is made clear by the decision of this Court in *Ruhlin v. New York Life Insurance Co.*, 304 U. S. 202, 208-209, 82 L. Ed. 1290, l. c. 1294, where it was said:

“Application of the ‘State law’ to the present case, or any other controversy controlled by *Erie Railroad Co. v. Tompkins*, does not present the disputants with duties difficult or strange. The parties and the federal courts must search for and apply the **entire body of substantive law** governing an identical action in the state courts.” (Emphasis ours.)

The interpretation of the contract and the rights of the parties could not be determined **in part** by the substantive

law of **Illinois** and in **part** by the substantive law of **Missouri**.

In order to reach the conclusion that it was immaterial whether the contract was governed by the law of Missouri or by the law of Illinois the Circuit Court of Appeals had to assume that the proof would show, as petitioner contended, that the contract was executed in Missouri and that it was not to be wholly performed in Illinois.

This hypothesis required a minute and careful consideration of every aspect of the substantive law of Missouri material to the controversy.

One of the most material questions of law involved was whether or not a contract which is silent as to its duration is ambiguous or incomplete so as to permit proof of the relationship of the parties, the subject matter of the contract, the usages of the business, the surrounding facts and circumstances attending the execution of the contract and its interpretation by the parties for the purpose of ascertaining the intention of the parties as to the duration of the contract.

The Circuit Court of Appeals held that such evidence was not admissible upon the ground that the contract was free from ambiguity (R. 54-55). In so doing, however, the Circuit Court of Appeals referred only to **Illinois** law and gave no consideration to the Missouri law (R. 54-55).

The admissibility of evidence under the so-called "parol evidence rule," however, is a matter of **substantive** law, as distinguished from procedural law and upon the hypothesis that the contract was a Missouri contract, the question as to the admissibility of such evidence was to be decided in accordance with Missouri law.

American Crystal Sugar Co. v. Nicholas (C. C. A. 10), 124 F. 2d 477, 479;

Zell v. American Seating Co. (C. C. A. 2), 138 F. 2d 641, 643;

Wooton Hotel Corp. v. Northern Assurance Co. (C. C. A. 3), 155 F. 2d 988, 990.

In American Crystal Sugar Co. v. Nicholas, supra, the Circuit Court of Appeals for the Tenth Circuit said (124 F. 2d 477, l. c. 479):

“The (parol evidence) rule is in no sense a rule of evidence but one of substantive law. The contract was made in Utah and so far as the transfer of stock was concerned was to be performed in that state. Hence, the law of Utah governs the rule, its application and its limitations.”

The application of the Illinois parol evidence rule by the Circuit Court of Appeals to a contract which by hypothesis is a Missouri contract, is in conflict with the decisions of the Second, Third and Tenth Circuits above cited.

If, as was suggested by the Second Circuit in Zell v. American Seating Co., 138 F. 2d 641, 643, the question as to whether the parol evidence rule is substantive is to be decided by the conflict of laws rule of the State in which the federal court is located, the Circuit Court of Appeals was likewise required to apply the Missouri law, since in Illinois the parol evidence rule is held to be a matter of substantive law.

Berkshire Life Ins. Co. v. Jackson Realty & Management Corp., 328 Ill. App. 318, 65 N. E. 2d 578, Headnote 5.

While it is true, as the Circuit Court of Appeals stated in its Opinion that “the object of construction is to ascertain the intention which the parties have expressed in the language of their contract and where there is no am-

biguity in the terms, the instrument itself is the only criterion of the intention of the parties" (R. 54), the real question to be determined was whether or not a contract which failed to specify the period of its duration was or was not ambiguous.

Many distinguished courts have held, contrary to the view of the Circuit Court of Appeals, that where a contract fails to specify its duration an **ambiguity** exists permitting proof of the intention of the parties by extrinsic evidence.

American Type Founders, Inc., v. Lanston (CCA 3),  
137 F. 2d 728;

Miss. River Logging Co. v. Robson (CCA 8), 69 Fed.  
773;

Miller v. Miller (CCA 10), 134 F. 2d 583;

Coca Cola Bottling Co. v. Coca Cola (D. C. Del.),  
269 F. 796.

At least two distinguished federal courts have held that a contract not limited in time is **presumably** perpetual in the obligation it imposes except when the contract is for personal services.

Manners v. Morosco (CCA 2), 258 F. 557, 558, 559;  
Western Union Tel. Co. v. Penn. Co. (CCA 3), 129 F.  
849, 861.

Since by hypothesis the Circuit Court of Appeals was treating the contract as a Missouri contract it should have approached this question of ambiguity, not from the point of view of an Illinois court, but from the point of view of a Missouri Court.

In Missouri "a contract is ambiguous when its terms are reasonably susceptible of different constructions."

Paisley v. Lucas, 346 Mo. 827, 143 S. W. 2d 262,  
l. c. 267.

Missouri has freed itself "from the primitive formalism which views the document as a self-contained and self-operative formula."

Ambassador Bldg. Corp. v. St. Louis Ambassador,  
238 Mo. App. 600, 185 S. W. 2d 827, 836.

In Missouri it is held that:

"For the purpose of determining the intention of the parties and reaching a construction that is fair and reasonable under all the facts and circumstances, the court may consider the relationship of the parties, the subject matter of the contract, the usages of the business, the surrounding facts and circumstances attending the execution of the contract and its interpretation by the parties."

Paisley v. Lucas, 346 Mo. 827, 839, 143 S. W. 2d 262, 268;

Ambassador Bldg. Corp. v. St. Louis Ambassador,  
238 Mo. App. 600, 185 S. W. 2d 827, 837.

A consideration of the Missouri law would have disclosed to the Circuit Court of Appeals that the Supreme Court of Missouri did inquire into the surrounding circumstances in determining whether a contract of agency was terminable at will.

For in Paisley v. Lucas, 346 Mo. 827, 143 S. W. 2d 262, l. c. 270, the Supreme Court of Missouri said:

"The language of the amendment, while evidencing a present intention not to cancel, does not indicate an express intention to confer upon appellant a perpetual right of employment. *Minter v. Dry Goods*, 187 Mo. App. 16, 26, 173 S. W. 4. **No such intention appears from the evidence in the record.** Considering the language used, **the subject matter of the contract and the situation of the parties**, we think the contract

was to continue only so long as it was mutually satisfactory to the parties." (Emphasis ours.)

The Circuit Court of Appeals could not disregard the Missouri law as to the admissibility of extraneous evidence and apply the Illinois law thereto if the contract was a Missouri contract, as it assumed in holding that the failure of the District Court to follow *Erie v. Tompkins* did not invalidate the judgment.

Other important aspects of the substantive law of Missouri highly material to the rights of the petitioner were ignored by the Circuit Court of Appeals including the following:

(a) The effect of the Missouri rule that a party who receives in connection with a continuing contract the benefit of an independent additional consideration is not permitted to abandon the contract at will.

*Fullington v. Ozark Supply Co.*, 327 Mo. 1167, 39 S. W. 2d 780, 783;

*Paisley v. Lucas*, 346 Mo. 827, 143 S. W. 2d 262, 271;  
*Schonwald v. Burkhart Mfg. Co.* (Mo. Sup.), 202 S. W. 2d 7, 15.

(b) The effect of the Missouri rule that a contract terminable at will can be terminated only upon reasonable notice and in good faith.

*Paisley v. Lucas*, 346 Mo. 827, 143 S. W. 2d 262, 271;  
*Meyer Milling Co. v. Baker* (Mo. App.), 10 S. W. 2d 668, 670;

*Clarkson v. Standard Brass Co.*, 237 Mo. App. 1018, 170 S. W. 2d 407, 415.

(c) The effect of the Missouri rule that an obligation to perform will be implied from a party's acceptance of a contract.

*Beebe v. Columbia Axle Co.*, 233 Mo. App. 212, 117 S. W. 2d 624, 631.

An exhaustive presentation of the Missouri law in the respects above set forth cannot be made within the permissible confines of a brief in support of a petition for a writ of certiorari but we desire to point out briefly the importance of the impact of the Missouri law on the rights of the petitioner.

(a) In *Fullington v. Ozark Supply Co.*, 327 Mo. 1167, 39 S. W. 2d 780, 783, the Supreme Court of Missouri said:

"The decision reached is founded on the obligation of the parties arising out of their mutual promises to hire and to serve for the period stated in the agreement, and supplemented by actual service. Therefore, it is not necessary for a decision of this case to determine whether the purchase by appellant from respondent of shares of its stock, to the amount of \$3,000 as the petition recites, was a further valuable consideration supporting the contract, independent of the consideration of the mutual promises of the parties. **Independent or additional consideration, such as a release of a cause of action, serves to turn into constant, steady, or even lifetime employment's contracts of hire which otherwise would be terminable at will by either party. *Harrington v. Kansas City Cable Railway Co.*, 60 Mo. App. 223.**" (Emphasis ours.)

The foregoing statement was recognized as the law of Missouri in the comparatively recent case of *Schonwald v. Burkhardt Mfg. Co.* (Mo. Sup.), 202 S. W. 2d 7, l. c. 15.

It is the generally accepted view that contracts of employment which are silent as to duration are terminable at will. In Missouri the grant of an independent additional consideration places upon the recipient of that consideration the obligation of furnishing constant employment.

Thus, if the obligation to furnish employment is based upon a consideration independent of and additional to the agreement of the employee to serve, such as the release of a cause of action or the purchase of stock, the employer who has received the benefit of the independent, additional consideration cannot abandon his obligation under the contract at will.

In the case at bar petitioner conferred upon the respondent the right to use the name "Lemp" as part of its corporate title and in connection with the manufacture of beer and the use of the Lemp formulae, records and analyses to the end that respondent could make and sell Lemp beer.

But independently of and in addition to these grants and consents, petitioner gave to respondent an option for a period of five years to purchase its assets and all the stockholders of petitioner gave to respondent an option for a period of five years to purchase their stock (R. 17, 18, 19).

Obviously these options were unrelated to the manufacture of beer in the same way that the release of a cause of action by an employee is unrelated to the services he is to perform.

If the petitioner at the time the contract was entered into had paid the respondent a million dollars in cash, it certainly could not have pocketed the money and thereafter abandoned the contract at its will. The grant of the option by the petitioner and by its stockholders was a present conveyance of a valuable property right constituting an independent, additional consideration.

It was the duty of the Circuit Court of Appeals to give consideration and effect to the Missouri law to the effect that respondent was bound to perform as long as performance was possible.

The Circuit Court of Appeals held without reference to or discussion of the Missouri law that respondent was free

to terminate at will after the expiration of the period for the exercise of the option. But there is nothing in the Missouri law which makes the **nature** and **extent** of the independent consideration relevant in a determination of the question.

(b) In the first count of its complaint petitioner pleading in the alternative had alleged that if the contract were terminable at will, such right to terminate could be exercised only upon reasonable notice, and that the notice was not reasonable (R. 8-9); and in the second count had alleged that respondent in terminating did not act in good faith (R. 9-12).

In connection with its charge that the notice was not reasonable and that good faith was lacking petitioner alleged that at the time notice of termination was given and continuously thereafter, there was in effect Order No. 66 of the War Food Administration; that under said Order malt grain and other products necessary in the manufacture of beer could not be lawfully acquired by brewers who were not actually engaged in the manufacture of beer during the base period March 1, 1942, to February 28, 1943; that petitioner was not so engaged during the base period because by its contract with respondent it had agreed not to make beer; and that during this period Lemp beer, which petitioner otherwise would have been at liberty to sell was being sold by respondent under the contract; that at the time respondent gave notice of termination it knew of said Order and knew that no quotas of malt grain, etc., would be available to petitioner (R. 8).

It was further alleged that at the time it gave notice of termination respondent knew that it would be impossible for petitioner to manufacture beer because of shortages of machinery, bottles and manpower (R. 8-9).

From the allegation of the complaint, the truth of which must be conceded, it appears that respondent was incorporated under the name "Lemp Brewing Company" on November 17, 1941 (R. 5); that at the time of its incorporation it had no right to the use of the name "Lemp," either as part of its corporate title or in connection with the manufacture of beer (R. 6); that in order to acquire these rights it purchased the contract which plaintiff had made with Central on November 24, 1941 (R. 6); that the only beer which respondent made from the time of its incorporation in November, 1941, until it abandoned the contract on February 28, 1945, was "Lemp" beer (R. 7).

It is thus clear that respondent was incorporated for the express purpose of making and selling Lemp beer under the contract, and that respondent was engaged in making beer during the base period fixed by Order 66 [March 1, 1942-February 28, 1943] as the result of rights conferred solely upon it by the contract.

Respondent's ability to receive quotas of malt grain and other ingredients under Order 66 of the War Food Board was the result of a right it had received under the contract; petitioner's inability to receive such quotas was the result of a right it had surrendered to the respondent under the contract.

It thus appears that respondent chose to give notice of termination at a time when the petitioner, as the result of regulations promulgated to advance the successful prosecution of the war, was disabled from exercising a right which it had surrendered to the respondent under the contract, although the respondent was eligible to receive quotas under the regulations as a result of the contract.

Certainly the jury which petitioner had demanded had the right to find that notice given at such a time and under

such circumstances was not reasonable, and that the termination was not in good faith.

The District Court, in its Opinion (R. 34), said "that the notice of termination given by defendant was not only reasonable in length of time but went beyond the requirements of the contract; that the economic condition of the country as affected by availability or non-availability of materials and equipment necessary for plaintiff to begin and carry on the business of manufacturing beer at the time of said notice is immaterial in view of the terms of the contract."

The Circuit Court of Appeals did not discuss or refer to the question of reasonable notice.

Neither the District Court nor the Circuit Court of Appeals undertook an examination of the Missouri law in respect to the necessity of giving reasonable notice or as to what constituted reasonable notice.

The Supreme Court of Missouri, the highest court of that State, has said that a contract for an indefinite term cancellable at will may be terminated only upon reasonable notice as appears from *Paisley v. Lucas*, 346 Mo. 827, 143 S. W. 2d 262, l. c. 271, as follows:

"We hold that appellant's contract was 'subject to cancellation' by its terms because in view of its particular provisions it was a contract for employment as general insurance agent and manager for an indefinite term and it could therefore be cancelled by either party upon **reasonable notice** to the other." (Emphasis ours.)

Two intermediate appellate courts of Missouri have similarly stated that a contract indefinite in its term can be cancelled only upon reasonable notice.

*Meyer Milling Co. v. Baker* (Springfield Ct. of Appeals), 10 S. W. 2d 668, l. c. 670;

Clarkson v. Standard Brass Mfg. Co. (Kansas City Ct. of Appeals), 237 Mo. App. 1018, 170 S. W. 2d 407, l. c. 415.

Where State law is to be applied by a federal court it is the duty of the federal court to "ascertain from all the available data what the State law is and apply it rather than to prescribe a different rule, however superior it may appear from the viewpoint of 'general law' and however much the state rule may have departed from prior decisions of the federal courts."

West v. American Telegraph & Telephone Co., 311 U. S. 223, l. c. 237, 85 L. Ed. 139, l. c. 144.

The ruling of the Supreme Court of Missouri that reasonable notice is necessary before there can be an effective termination of a contract for an indefinite term was binding upon the Circuit Court of Appeals if the contract was to be governed by the Missouri law and it was incumbent upon that Court to give consideration and effect to this aspect of the Missouri law.

The Springfield Court of Appeals held in Meyer Milling Co. v. Baker, 10 S. W. 2d 668, l. c. 670, that to terminate a contract indefinite as to time a party "must act in good faith." The Supreme Court of Missouri reversed the decision but on other grounds (328 Mo. 1246, 43 S. W. 2d 794).

It was the duty of the Circuit Court of Appeals to ascertain whether the decision of this intermediate appellate court was the law of Missouri and to give effect thereto if it found this to be the case.

West v. American Telegraph & Telephone Co., 311 U. S. 223, 85 L. Ed. 139;

Fidelity Union Trust Co. v. Field, 311 U. S. 169, 85 L. Ed. 109;

Six Companies of California v. Joint Highway District, 311 U. S. 180, 85 L. Ed. 114.

The Circuit Court of Appeals ignored the allegations of the complaint charging respondent with bad faith (R. 12) and gave no consideration to the Missouri law as it related to the necessity of good faith in connection with the termination of the contract.

(c) The Circuit Court of Appeals held that the only thing the contract bound the respondent to do was to pay royalties based upon the sale of beer sold under the Lemp name (R. 55).

Petitioner was not seeking to recover royalties but **damages** for the breach and abandonment of the contract.

The contract recited that the "parties deem it to be to their mutual advantage that through their mutual cooperation and under their mutual supervision a high quality beer be manufactured and produced by First Part to be sold under a name or designation containing the name 'Lemp'" (R. 14) and in the covenanting portion of the contract it was "**understood and agreed** that it was the mutual desire of all the parties hereto to produce and sell a high quality beer under the 'Lemp' name" (R. 17).

The contract required the respondent's predecessor to submit to its stockholders a proposal to change the corporate name to "Wm. J. Lemp Brewing Co." (R. 17); the complaint alleged that Central did, in October, 1939, change its corporate name to "Wm. J. Lemp Brewing Company" (R. 4), and that beginning November 1, 1939, it began the sale of Lemp beer under its new corporate name (R. 4).

The question to be determined was whether or not by the terms of the contract, by its acceptance thereof, and by entering on the performance of the same, Central became bound to make and sell a high quality beer.

That question had to be decided upon the basis of the Missouri law if the contract were a Missouri contract.

Would a Missouri court impose an obligation on Central to manufacture and sell Lemp beer where the parties had not only recited that the very purpose which animated them in making the contract was to produce and sell a high quality beer under the Lemp name, but had "agreed and understood" that such was their mutual desire and where Central had actually begun performance?

The Kansas City Court of Appeals, an intermediate appellate court of Missouri, in *Beebe v. Columbia Axle Co.*, 233 Mo. App. 212, 117 S. W. 2d 624, l. c. 631, held.

"As to the defendant's criticism that the contract in question was unilateral and lacking in mutuality so that neither party was bound thereby, it has been held that although a contract on its face and by its terms appears to be obligatory on one party only, yet, if it is the manifest intention of the parties that there should be a correlative obligation on the other party, the law will imply such obligation. *Lewis v. Atlas Mut. Life Ins. Co.*, 61 Mo. 534; *Glover v. Henderson*, supra; 13 C. J., art. 180, p. 334.

"The question, after all, is one of intention, to be gathered from the terms of the contract and the tenor thereof, considered in the light of the subject matter of which the contract deals.

"In this case the contract was clearly one by which the defendant employed the plaintiff as salesman and distributor of its axles, which necessarily, when accepted by the plaintiff, imported a correlative obligation on his part to act as such salesman and distributor in the territory specified. An agreement to serve may be implied. 12 C. J., art. 180, supra. **The contract could be brought into existence only by virtue of the recognition by the parties of the correlative obligations of the one to the other. It was entered into upon a mu-**

tual understanding of the obligations to be assumed by each." (Emphasis ours.)

It was the duty of the Circuit Court of Appeals to have measured the nature of the extent and nature of respondent's obligation in the light of the Missouri law. It failed either to consider or to give effect to the Missouri law.

### CONCLUSION.

Since, in a diversity case, the only law which a federal court may apply, within the limits of its power and authority under the Federal Constitution, is the entire body of the substantive law of the appropriate State, a scrupulous and meticulous inquiry into the appropriate State law would seem to be essential if the constitutional rights of the parties are to be observed.

When fundamental rights are asserted this Court, impelled by the solicitude it entertains for the protection of such rights, feels that it is incumbent upon it "to inquire not merely whether those rights have been denied in express terms, but also whether they have been denied in substance and in effect." *Oyama v. State of California*, 92 L. Ed. 257 (Adv. Opinions).

While it is true that neither the District Court nor the Circuit Court of Appeals undertook in **express** terms to deny that petitioner had the right, which it invoked throughout the proceedings, to have its rights determined in accordance and only in accordance with the appropriate State law, the action of the former in rendering judgment upon pleadings which made it impossible to ascertain the appropriate State law and without reference to the appropriate State law, and of the latter in affirming a judgment entered under such circumstances, was a denial of that right in substance and effect.

While it is true that the Circuit Court of Appeals in holding that it was immaterial whether the rights of petitioner were governed by the law of Missouri or by the law of Illinois did not in **express** terms deny the petitioner's claim that it was entitled to the benefit of all the substantive law of Missouri, its action in applying part of the substantive law of Illinois and in failing to give consideration to many important and material phases of the law of Missouri, was in substance and effect a denial of that right.

The course followed by the District Court and by the Circuit Court of Appeals involves a grave and serious departure from the principle established by this Court in the Erie case and steadfastly applied thereafter. As such it merits the consideration of this Court.

Respectfully submitted,

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